

# HOGAN & HARTSON

L.L.P.

PETER A. ROHRBACH  
PARTNER  
(202) 637-8631  
PAROHRBACH@HHLAW.COM

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COLUMBIA SQUARE  
555 THIRTEENTH STREET, NW  
WASHINGTON, DC 20004-1109  
TEL (202) 637-5600  
FAX (202) 637-5910

Ms. Marlene H. Dortch  
Federal Communications Commission  
445 Twelfth St, NW  
Washington, D.C. 20554

**Re: AT&T Petition for Declaratory Ruling that its Phone-to-Phone  
IP Telephony Service Is Exempt from Access Charges  
WC Docket No. 02-361**

Dear Ms. Dortch:

WilTel Communications, LLC ("WilTel") responds here to the ex parte letter ("Letter") of AT&T Corp. ("AT&T") filed on March 31, 2004. The AT&T Letter underscores why immediate action is necessary in this docket to prevent continued and growing market distortion.

WilTel agrees with AT&T that its Petition requires a complete and non-discriminatory ruling on the application of the current access charge rules to phone-to-phone telephony using IP transport. However, we strongly disagree with AT&T's suggestion that this ruling can be delayed. The Commission owes it to the industry and the public to explain its existing access rules. This docket now is nearly 18 months old. Each additional day of delay: (i) further warps competition among service providers; (ii) increases the amount at stake in the associated "retroactivity" dispute; (iii) increases the jeopardy to universal service policy interests; and (iv) further distracts companies from focusing on the real business of better meeting their customers' needs.

The AT&T Letter addresses a recent WilTel ex parte concerning three interrelated scenarios for the provision of phone-to-phone telephony using IP transport technology. In all three scenarios calls originate and terminate on the PSTN, but are transmitted in IP format for part of the transmission path. In Scenario 1 a single company performs both the TDM-to-IP and IP-to-TDM conversion. In Scenarios 2 and 3 one company handles the TDM-to-IP conversion, and hands the call to a second company who performs the IP-to-TDM conversion. That second company may characterize itself as an IXC (Scenario 2) or an "ESP" (Scenario 3). 1/

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1/ See WilTel Ex Parte Letter, CC Docket No. 02-361, at 1-2 (Mar. 12, 2004). For the Commission's convenience, another copy of the diagram of these three Scenarios is also attached here.

AT&T argues strongly that all three Scenarios should be treated the same because all three make the same use of the PSTN. According to AT&T, either all three are exempt from access, or none are. AT&T observes that if only one or two of these Scenarios is held exempt from access, this decision "would create a loophole that would quickly swallow the rule." Companies would immediately reconfigure their networks to take advantage of the favored Scenario to avoid access. AT&T Letter at 5-6. AT&T argues that this outcome would constitute unlawful discrimination, and "directly harm competition" because "both AT&T and these other entities would be transporting *identical* traffic." *Id.* at 6 (original emphasis).

WilTel agrees. The Commission would foster uneconomic regulatory arbitrage if it were to rule in favor one Scenario over another with regard to access charge obligations. But at least such a Commission decision (addressing each Scenario) would allow every company to know the rules of the road, and each could plan its business accordingly. 2/

Unfortunately, the current situation is even worse, which is why immediate action on the AT&T Petition is required. The reality is that substantial regulatory arbitrage already is happening today, with rapidly increasing breadth and intensity. Some companies are not paying access charges in Scenarios 1, 2 and/or 3; others are doing so. However, these differing actions are driven entirely by the relative amount of regulatory and litigation risk that companies are willing to incur in the absence of a Commission decision. Given that access charges are the single largest cost of service, the current uncertainty has two consequences. First, those firms more willing to risk "crossing the line" gain a major competitive advantage over those that are more intent on understanding and following the law. But second, as the Commission has deferred action and the situation has continued, even the latter firms increasingly are required to reconfigure their networks to avoid paying access charges -- taking on the corresponding litigation and compliance risk to stay competitive.

This situation is simply wrong. WilTel has been asking for a decision on the AT&T Petition -- any decision -- for months. 3/ The Petition has now been pending for a year and a half and counting. WilTel has emphasized that any answer is better than no answer at all. We can plan our business whether the ruling is that access obligations attach or not; what we cannot accept is continuing uncertainty. Thus, while it may be most logical to treat all three phone-to-phone scenarios the same, by far WilTel's priority is to have a clear statement on all three. 4/ A Commission ruling, even one that finds access due in one scenario but not another,

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2/ AT&T also is correct that if the Commission finds one Scenario but not others exempt from access, traffic will quickly migrate to the access-free Scenario. This will occur even if the access-free Scenario is otherwise less efficient, or has adverse service quality implications. SBC has presented evidence of such rapid traffic migration occurring already, in advance of a Commission decision. See SBC Ex Parte Letter, CC Docket No. 02-361, at 1-2 (Feb. 23, 2004).

3/ See, e.g., WilTel Ex Parte Letter, CC Docket No. 02-361, Attachment, at 1-2 (Dec. 3, 2003). WilTel Ex Parte Letter, CC Docket No. 02-361, at 1-2 (Jan. 23, 2003).

4/ It should go without saying that if the FCC expressly addresses only one or two of the three Scenarios in an order on the AT&T Petition, it de facto will be addressing the other(s) sub silentio. Firms will treat FCC silence as a determination that access does not apply, and migration to such an access-free

finally will allow WilTel and its competitors to go back to competing based on our respective costs and service quality, and not on our differing tolerances for litigation risk.

WilTel strongly disagrees with AT&T's suggestion that the Commission wait and resolve the issues raised in this Petition in the new *VoIP NPRM* proceeding. <sup>5/</sup> See AT&T Letter at 6. We and others in the industry need to know today whether and when we must pay access charges today when PSTN-to-PSTN calls are transported using IP transport today. The FCC has a core obligation to answer this fundamental question arising under its current rules. AT&T's request for delay is tantamount to a request for dereliction of duty on the part of the agency. Contrary to AT&T's suggestion, deferring these issues to the VoIP NPRM (or the intercarrier compensation docket) would not serve the public interest. It would only prolong the market distortions occurring today -- for the many months to come until those proceedings eventually are completed.

To be clear, failure of the Commission to act is not neutral. The Commission is impacting markets now by favoring firms that are more willing to take on the litigation risk of not paying access in Scenarios 1, 2 and/or 3. The longer the Commission takes to answer the question presented by the AT&T Petition, the more competitive pressures will force other companies to do the same. The current dispute over "retroactivity" will snowball in financial significance. If "retroactivity" is a hard question now, imagine the difficulty if the amounts in dispute were allowed to grow three and four times higher, or even greater. Universal service policy interests would be further jeopardized. Even more business resources would be wasted in litigation.

The AT&T Letter actually underscores why the Commission should not delay any longer in issuing an order here. AT&T complains sharply about market distortion and discrimination. But AT&T at least will be able to make rational business decisions on the same footing as all other companies once the FCC finally clarifies its current access rules in each of three phone-to-phone Scenarios. This is true whether or not the Commission finds that access is due today in any or all of the Scenarios. The FCC can make clear that its interpretation of the current rules is without prejudice to changes it might make some time in the future. But what the FCC cannot do is leave the industry swirling in confusion on this core issue for months more to come, competing on relative litigation risk while trying to read the Commission's mind. That is the real source of market distortion and discrimination today.

In short, the FCC should reject AT&T's suggestion that the Commission not do its job. Rather, the Commission should finally act to clarify its access charge rules as they apply

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Scenario will accelerate. WilTel respectfully urges the Commission not to leave any such result implicit; a direct ruling is necessary on each of the three Scenarios to minimize further disputes among the parties.


<sup>5/</sup> *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 4-28 (released March 10, 2004) ("*VoIP NPRM*").

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to the three Scenarios at issue so that the industry can make logical business decisions without regulatory uncertainty and litigation risk.

Respectfully submitted,

WiITel Communications, LLC

By   
Peter A. Rohrbach  
David L. Sieradzki

Its Attorneys

cc: Christopher Libertelli  
Matthew Brill  
Daniel Gonzalez  
Jessica Rosenworcel  
Scott Bergmann  
William Maher  
Jeffrey Carlisle

